



At the preliminary hearing, it was agreed that the discovery deposition of claimant was to be considered part of the evidentiary record. The following discussion occurred at the preliminary hearing:

**MR. SCHAEFER:** I do not have an objection. The only issue I would bring up otherwise is we have taken Mr. Tresner's discovery deposition. I don't know if the parties want to agree to go ahead and offer that today for the Court's consideration. I'm looking in my file and I only have a copy; I don't have the original. But it may provide some additional insight.

**MR. CARMICHAEL:** Your Honor, I don't have any problem with the Court considering that discovery deposition; but quite frankly, I want the Court to be able to judge the credibility of my client, so I want him to testify here today.

**MR. SCHAEFER:** Oh, no, I --

**MR. CARMICHAEL:** I hate to have the Court have to read the discovery deposition for what is likely no reason, but I don't object to it.

**MR. SCHAEFER:** That's fine.

**THE COURT:** Claimant's Exhibits 1 and 2 are admitted. And if you want to send me that discovery deposition, I'll make it a part of the record.<sup>1</sup>

And the respondent's brief to the Board contains citations to the discovery deposition which show that it considered the discovery deposition as part of the evidentiary record and suggests that the discovery deposition was sent to the ALJ.

But the claimant's discovery deposition is neither contained within the Division's administrative file nor does there appear to be any record of it having been filed with the Division of Workers Compensation. The Worker Compensation Division's computer "action codes" do not show that the discovery deposition was filed.

The record the ALJ considered was not listed in her Order. Nonetheless, the ALJ did not consider the claimant's discovery deposition testimony because that deposition is not contained within the Judge's file and there is no record of it having been filed with the Division. Accordingly, the ALJ did not consider the entire record before issuing her Order on April 15, 2011.

While it could be argued that it was left up to respondent whether or not to send the discovery deposition to the ALJ, it was clear respondent wanted the discovery deposition to be part of the evidentiary record. Claimant had no objection and the ALJ agreed to

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<sup>1</sup> P.H. Trans. at 9-10.

make it a part of the evidentiary record. After careful consideration, this Board Member finds the Order of the ALJ should be set aside and the matter remanded to the ALJ for consideration of the entire record.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>2</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>3</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated April 15, 2011, is reversed and the case is remanded to the ALJ for a determination after considering the entire record.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2011.

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DAVID A. SHUFELT  
BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant  
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge

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<sup>2</sup> K.S.A. 44-534a.

<sup>3</sup> K.S.A. 2010 Supp. 44-555c(k).